IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

NO. 28086

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

vs.

EDWARD JAMES DRASKOVICH,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

HONORABLE SUSAN M. SABERS
Circuit Court Judge

APPELLANT'S BRIEF

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Notice of Appeal Filed on January 5, 2017

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PRELIMINARY STATEMENT

All references herein to the Settled Record are referred to as "SR". The transcript of the Arraignment Hearing held May 19, 2016 is referred to as "AH". The transcript of the Court Trial held August 16, 2016 is referred to as "CT." The transcript of the Sentencing Hearing held November 1, 2016 is referred to as "ST." Exhibits introduced during trial are referred to as "Ex." followed by the exhibit number. All references will be followed by the appropriate page number or, for videos, time designation. Defendant and Appellant, Edward Draskovich, will be referred to as "Draskovich."

JURISDICTIONAL STATEMENT

Draskovich appeals both of his convictions in the Judgment and Sentence entered December 6, 2016, by the Honorable Susan Sabers, Circuit Court Judge, Second Judicial Circuit. SR 42-44. Draskovich's Notice of Appeal was filed January 5, 2017. SR 45. This Court has jurisdiction over the appeal pursuant to SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUE

I. WHETHER DRASKOVICH'S STATEMENTS CONSTITUTED PROTECTED SPEECH UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The trial court found Draskovich guilty of threatening a judicial officer and disorderly conduct under SDCL 22-11-15 and SDCL 22-18-35.

People ex rel. C.C.H., 2002 S.D. 113, 651 N.W.2d 702

Watts v. U.S., 394 U.S. 705 (1969)

State v. Krijger, 313 Conn. 434, 97 A.3d 946 (2014)

SDCL 22-11-15

SDCL 22-18-35

STATEMENT OF CASE

On May 4, 2016, the Minnehaha County grand jury returned an indictment charging Draskovich with Count 1: Threatening a Judicial Officer, on or about March 7, 2016, in violation of SDCL 22-11-15; and Count 2: Disorderly Conduct, on or about March 7, 2016, in violation of SDCL 22-18-35. SR 12. Draskovich was arraigned on the charges on May 19, 2016. *See* AH. A court trial

in the matter was held on May 6, 2015.[1] *See generally* CT. At the conclusion of the trial, the court found Draskovich guilty of both counts in the indictment. CT 60-61.

Sentencing was held November 1, 2016. *See generally* ST. On Count 1, Judge Sabers imposed five years in the South Dakota State Penitentiary, with all five years suspended. CT 24. Draskovich was placed on supervised probation and ordered to serve 180 days jail, with 90 of those days suspended. CT 24. On Count 2, the court suspended 30 days in jail and ordered the sentence to run concurrent with Count 1. CT 25. Judgment and Sentence was entered on December 6, 2016. SR 42.

STATEMENT OF FACTS

On March 7, 2016, Draskovich went to the Minnehaha County Clerk of Court's Office to inquire into whether the magistrate court had approved his request for a restricted driver's permit ("work permit") related to his conviction for driving under the influence. CT 10, 14, 21. Draskovich also sought the return of a cash bond he had previously posted in connection with the appeal of his DUI conviction. CT 21-22. Draskovich had been into the office on several previous occasions to check up on these matters. CT 21, 28. According to April Allenstein, supervisor in the accounting division of the clerk's office, Draskovich was usually "yelling or speaking loudly." CT 24. With regard to his requests,

[1] Draskovich waived his right to a jury trial on the record prior to the court trial. CT 4-6.

Allenstein admitted Draskovich "did kind of have a complicated case, complicated issues. So he often was angry about it." CT 23.

That day, Draskovich appeared to Allenstein to be "angry and frustrated" about the answers he was receiving. CT 23-24. Upon his arrival, one of Allenstein's coworkers in the office assisted Draskovich and informed him that the order to return his bond was still not signed, and therefore the clerk's office could not give him his bond money back. CT 22-23. Draskovich subsequently walked over to the criminal division to check on his work permit, but Allenstein did not think "he got a good answer down there either." CT 23. Draskovich then returned to the counter of the accounting division and commented, "Now I see why people shoot up courthouses." CT 23. Before leaving the office, Draskovich added, "Not that I would." CT 23.

Allenstein characterized Draskovich's behavior as "intimidating and scary," CT 26, and testified that the workers in her section "were very startled and alarmed . . . ." CT 24. After the incident, Allenstein gave a statement to Deputy Craig Olson in security about what Draskovich had said. CT 28.

After leaving the clerk's office, Draskovich went upstairs to the court administration office to seek other documents related to his case. CT 29. He was met there by Brittan Anderson, a coordinator employed in the office. CT 29-30. Anderson described Draskovich's demeanor as being agitated that day. CT 30. Anderson testified that she was familiar with Draskovich because he had visited the office on previous occasions regarding appeal issues and was always either

angry or agitated. CT 31-32. First, Draskovich requested documents out of his court file, but Anderson told him if he needed copies he would have to go back downstairs to the clerk's office. CT 30-31. Next, according to Anderson, Draskovich began talking about his request for a work permit and the fact that Judge Salter would not give him a work permit.[2] CT 31. Anderson testified that she told Draskovich it was not Judge Salter's fault because Draskovich needed to complete treatment before he could obtain a work permit. CT 31. At that point, Draskovich responded, "Well, that deserves 180 pounds of lead between the eyes," and walked out of the office. CT 32.

On cross-examination, defense counsel clarified Draskovich's statements and the context in which they were given:

> Defense: Judge Salter was not present at the time these comments were made, correct?
>
> Anderson: Correct.
>
> Defense: He was not anywhere that he could have heard these statements being made; is that correct?
>
> Anderson: Yes.
>
> Defense: And Mr. Draskovich came to the 3rd floor seeking some paperwork and you informed him he had to go back downstairs for that paperwork?
>
> Anderson: Correct.

---

[2] Allenstein testified that Draskovich had requested the work permit from Magistrate Judge Damgaard and was awaiting a response from her. CT 21. Judge Salter testified that Judge Damgaard had jurisdiction over any decisions related to Draskovich's request for a work permit after the appeal of the DUI case was concluded. CT 14.

Defense: And you told him that it is not Judge Salter's fault, it is the law, the judge can't deviate from that?

Anderson: Correct.

Defense: And he stated, "Well, that deserves 180 pounds of lead between the eyes?"

Anderson: Yes.

Defense: He never said I'm going to put 180 pounds of lead between Salter's eyes?

Anderson: No.

Defense: Never said anything such as you tell the judge from me that dot dot dot?

Anderson: No.

Defense: Never told you to give Judge Salter any message?

Anderson: No.

Defense: Never left a message for Judge Salter?

Anderson: No.

Defense: Never made any shooting gestures with his hands?

Anderson: No.

Defense: You testified that Mr. Draskovich had been to your office before?

Anderson: Correct.

Defense: And I'm assuming on previous times he was being loud?

Anderson: Yes.

Defense: And possibly rude?

Anderson: Yes.

Defense: Is it fair to say this statement gave you a weird feeling, this statement that he made?

Anderson: A shocked feeling.

Defense: Did he give you pause?

Anderson: Yeah.

Defense: Made you think he shouldn't be making that type of statement?

Anderson: Yes.

CT 34-36.

Anderson concluded Draskovich was directing his "180 pounds of lead between the eyes" statement at Judge Salter in light of the topic they were discussing immediately before the statement was made. CT 32. Anderson testified that she was shocked and surprised by Draskovich's words, and she provided a statement to security roughly fifteen to twenty minutes after the incident occurred. CT 33,

The following day, March 8, 2017, Detective Zishka contacted Draskovich by phone to discuss Draskovich's statements. CT 42; *See generally* Ex. 1. Draskovich expressed to Detective Zishka his frustration with court and jail staff over a number of issues, including being unable to take his prescribed medication while in jail, his inability to obtain a permit to drive to work until he finished treatment, the delay in securing the return of his bail once his case had concluded, and his inability to get answers from staff in both the clerk's office

and court administration. Ex. 1 at 1:03-2:09; 2:26-2:39; 3:00-3:36. Draskovich denied threatening anyone the day prior, and Detective Zishka conceded to Draskovich that "we're not talking about terroristic threats. We're talking about disorderly conduct. And you can look up the statute." Ex.1 3:47-4:21; *see* CT 54.

At trial, Circuit Judge Mark Salter testified that his understanding of what Draskovich said to Anderson in court administration "was a threat to fire a round, a rifle round or some sort of round having a certain grain bullet, between my eyes." CT 15. Judge Salter said he was "concerned" when he learned of the comments and made a conscious effort to be more careful about his surroundings. CT 15-16.

On cross-examination, Judge Salter acknowledged Draskovich had never made any of those statements directly to him. CT 17. Judge Salter agreed that he had presided over a hearing related to Draskovich's appeal of a case from magistrate court, and that Draskovich did not make any threats to him at the hearing or cause any other security concerns. CT 17. Draskovich also sent two letters to Judge Salter during the appeal process, neither of which contained any threatening language. CT 17-19; Ex. A, B.

At the conclusion of the court trial, defense counsel contended Draskovich's statements were ambiguous as to whether they were referring to any particular person, and the words implied no intent or determination to carry out violence against the judge. CT 52-53. Applying the five factor analysis adopted by this Court in *People ex rel. C.C.H.*, 2002 S.D. 113, 651 N.W.2d 702, the

defense argued the words did not rise to the level of a "true threat," but rather constituted protected speech under the First Amendment. CT 53-56.

The prosecutor argued that "[s]tating a person deserves, whether it be 180 pounds or 140 grains, of lead between the eyes is a threat," and compared Draskovich's words to yelling fire in a movie theater. CT 47-48. The prosecutor pointed to the shocked and startled reaction to the statements by those assisting Draskovich, as well as Judge Salter's concern upon later learning of the statements as support for the position that Draskovich's words rose to the level of unprotected speech. CT 47-49; *see* CT 24, 33.

The trial court ultimately found Draskovich guilty on both counts in the indictment. CT 60-61.

ARGUMENT

I. DRASKOVICH'S STATEMENTS WERE INSUFFICIENT TO RISE TO THE LEVEL OF A "TRUE THREAT," AND THUS CONSTITUTED PROTECTED SPEECH UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

"Constitutional questions, such as those involving First Amendment rights, are reviewed by this Court de novo." *In re S.J.N-K*, 2002 S.D. 70, ¶ 6, 647 N.W.2d 707, 710 (citing *City of Pierre v. Blackwell*, 2001 SD 127, ¶ 7, 635 N.W.2d 581, 584); *see People ex rel. C.C.H*, 2002 S.D. 113, ¶ 8, 651 N.W.2d 702, 705. The United States Supreme Court has held that, in cases requiring an appellate court to draw "the line between speech unconditionally guaranteed and speech which may legitimately be regulated[,]" it is the reviewing court's duty to conduct an

independent examination of "the statements in issue and the circumstances under which they were made to see whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." *New York Time Co. v. Sullivan*, 376 U.S. 254, 285 (1964) (quoting *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946)). An independent examination of the entire record by the Court is necessary to make sure "the judgment does not constitute a forbidden intrusion on the field of free expression." *Id*.

In reviewing the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Tofani*, 2006 S.D. 63, ¶ 37, 719 N.W.2d 391, 401 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The Court does "not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence on appeal." *State v. Carter*, 2009 SD 65, ¶ 44, 771 N.W.2d 329, 342.

In Count 1, Draskovich was convicted of threatening a judicial officer under SDCL 22-11-15, which provides:

> Any person who, directly or indirectly, utters or addresses any threat or intimidation to any judicial or ministerial officer, juror, member of the Board of Pardons and Paroles, or other person authorized by law to hear or determine any controversy, or any court services officer, with intent to induce the person either to do any act not authorized by law, or to omit or delay the performance of any duty imposed upon the person by law, or for having

> performed any duty imposed upon the person by law, is guilty of a Class 5 felony.

A statute such as SDCL 22-11-15, "which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected." *Watts v. U.S.*, 394 U.S. 705, 707 (1969).

"The First Amendment, applicable to the States through the Fourteenth Amendment, provides that 'Congress shall make no law . . . abridging the freedom of speech.'" *Virginia v. Black*, 538 U.S. 343, 358 (2003) (quoting U.S. Const. amend. I). "The hallmark of the protection of free speech is to allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting." *Black*, 538 U.S. at 358 (citing *Abrams v. United States*, 250 U.S. 616, 630 (1919). "The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech." *Black*, 538 U.S. at 358. "[T]he First Amendment does not permit the government to punish speech merely because the speech is forceful or aggressive. What is offensive to some is passionate to others." *U.S. v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996).

The right to free speech, however, is not absolute. *Id.*; *see S.J.N-K*, 2002 S.D. 70, ¶ 6, 647 N.W.2d at 711. "The First Amendment permits 'restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Black*, 538 U.S. at 358-

59 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992)). One of those categories of speech exempt from constitutional protection are "true threats." *Watts v. U.S.*, 394 U.S. 705, 708 (1969); *see People ex rel. C.C.H.*, 2002 S.D. 113, ¶ 12, 651 N.W.2d 702, 706. In *Virginia v. Black*, the United States Supreme Court observed that "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. . . . The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. " 538 U.S. at 359-60 (Citations omitted; internal quotations omitted).

In determining whether statements qualify as true threats, the majority of the federal courts of appeal have adopted an "objective test that focuses on whether a reasonable person would interpret the purported threat as a serious expression of an intent to cause a present or future harm."[3] *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 622 (8th Cir. 2002) (en banc); *See U.S. v. Mabie*, 663 F.3d 322, 332 (8th Cir. 2011); *U.S. v. Zavrel*, 384 F.3d 130, 136 (3d Cir. 2004); *U.S. v.*

[3] The United States Supreme Court's decision in *Virginia v. Black*, supra, has raised some question about whether an objective test is still viable, or rather one that focuses on the subjective intent of the speaker to communicate a threat. *U.S. v. Bagdasarian*, 652 F.3d 1113, 1116-17 (9th Cir. 2011) (finding that "the subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech"); *see U.S. v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008) (noting it is more likely that "an entirely objective definition is no longer tenable" post-*Black*).

Armel, 585 F.3d 182, 185 (4th Cir. 2009); *U.S. v. Jeffries*, 692 F.3d 473, 479-80 (6th Cir. 2012). Some courts have applied a reasonable person test from the vantage point of a "reasonable speaker," while others have focused on a "reasonable listener" of the statements. *See U.S. v. Stewart*, 411 F.3d 825, 828 (7th Cir. 2005) (applying a test which asks whether "a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates a statement" as a threat); *Zavrel*, 384 F.3d at 136 (posing the question as "whether a reasonable person, familiar with the context in which a threat is communicated, would perceive the communication as a threat of harm").

The Eighth Circuit, which applies an objective test, has defined a "'true threat' as a 'statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another.'" *U.S. v. Mabie*, 663 F.3d 322, 332 (8th Cir. 2011) (citing *Pulaski*, 306 F.3d at 624). In *People ex rel. C.C.H.*, this Court adopted the Eight Circuit's true threat analysis. 2002 S.D. 113, ¶ 14, 651 N.W.2d 702, 707. This test requires the Court to consider a non-exhaustive list of factors "relevant to how a reasonable recipient would view the purported threat." These factors include:

1) The reaction of those who heard the alleged threat;

2) Whether the threat was conditional;

3) Whether the person who made the alleged threat communicated it directly to the object of the threat;

4) Whether the speaker had a history of making threats against the person purportedly threatened; and

5) Whether the recipient had a reason to believe that the speaker had a propensity to engage in violence.

Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616, 623 (8th Cir. 2002) (en banc); *see Dinwiddie*, 76 F.3d at 925.

In performing a true threats analysis, this Court must consider the statements at issue "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). "The Court must "analyze an alleged threat in the light of [its] entire factual context and decide whether the recipient of the alleged threat could reasonably conclude that it expresses a determination or intent to injure presently or in the future." *Austad v. S.D. Bd. Of Pardons & Paroles*, 2006 S.D. 65, ¶ 8, 719 N.W.2d 760, 764 (quoting *U.S. v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996)) (internal quotations omitted).

1. <u>The Reaction of the Listeners.</u>

The first factor requires the court to weigh the reactions of those who heard the statements. The present case involves two separate statements made by Draskovich to court staff members in two different offices located within the Minnehaha County Courthouse. In the clerk's office, Allenstein heard Draskovich say, "Now I see why people shoot up courthouses. . . . Not that I would." CT 23. Anderson, in court administration, heard Draskovich state, "Well

that deserves 180 pounds of lead between the eyes." CT 32. At trial, only Draskovich's statement to Anderson was alleged by the State to constitute a threat toward Judge Salter, while the statement overheard by Allenstein was alleged to satisfy the elements under Count 2, disorderly conduct. *See* CT 50. Accordingly, Anderson's reaction to the statement she heard is more pertinent for the purposes of a true threat analysis in Count 1.

The testimony elicited at trial established that both Allenstein and Anderson were startled and shocked by the manner in which Draskovich expressed his anger and frustration over the issues he was experiencing with the court system that day. CT 24-26, 33. The vitriolic and violent nature of the criticism alarmed the listeners, and caused both Allenstein and Anderson to report the statements to a security officer at the courthouse. CT 26-27, 33. Judge Salter, the object of the alleged threat, testified that he was "concerned" when he learned of the statements made by Draskovich, and made a conscious effort to be careful and more aware of his surroundings in everyday life. CT 15-16.

On the other hand, neither Anderson nor Judge Salter testified that they were actually fearful that Draskovich would, or had the capacity to, harm them. CT 15-16, 33-34, 36. Further, Draskovich was not apprehended or arrested by security at the courthouse after making either statement and was allowed to leave and go home. *See* CT 42-45. Captain Paul Niedringhaus[4] testified that a

[4] The transcript of the Court Trial misspells the Captain's last name as "Niddringhaus." *See* CT 37.

BOLO is typically put out "when we believe there is public safety, imminent public safety, or somebody that's possibly armed and carrying a weapon . . . ." but law enforcement did not put out a BOLO for Draskovich upon reviewing the reports the same day. CT 43-45. Draskovich was not contacted by law enforcement until the next morning when Detective Zishka placed a call to Draskovich's home. CT 44; *See* Ex. 1. During that phone conversation, Draskovich denied threatening anyone, and Detective Zishka conceded that "we're not talking about terroristic threats. What we're talking about is disorderly conduct." Ex. 1 at 4:04-4:08. The reaction by police to the allegations, as well as Detective Zishka's statements to Draskovich over the phone the next day, suggests law enforcement did not view Draskovich's statements as constituting a serious or immediate threat to anyone's safety.

Several courts have considered the reactions of those who hear statements to help determine whether they constitute true threats. At one end of the spectrum, in *Watts v. U.S.*, a crowd discussing the military draft at a public rally on the Washington Monument grounds laughed in response to the defendant when he said, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." 394 U.S. at 706. Taking into consideration the public setting in which the statement was made, the conditional nature of the statement and the reaction of the crowd, the Supreme Court deemed the defendants statement not to constitute a true threat, but rather "a kind of very crude offensive method of stating political opposition to the President." *Id*. at 708.

On the other end of the spectrum, in *U.S. v. Dinwiddie*, the defendant, an anti-abortion protestor, made roughly fifty statements to Dr. Crist, Medical Director of Planned Parenthood, often through a bullhorn, warning him to remember the name of another doctor who had been previously killed by an anti-abortion protestor, and saying, "This could happen to you. . . . He is not in the world anymore. . . . Whoever sheds man's blood, by man his blood shall be shed. . . ." 76 F.3d 913, 917 (8th Cir. 1996). The same defendant was known to have physically assaulted a Maintenance Supervisor at the clinic with an electric bullhorn on a prior occasion, as well as threatened the lives of other staff members there. *Id*. at 917-18. In response, Dr. Crist began to wear a bullet-proof vest and the clinic hired an armed guard. *Id*. at 918. Based in large part on Dr. Crist's fearful reaction to the statements, the fact that the statements were directly communicated to Dr. Crist, and the doctor's awareness that the defendant had previously attacked an employee of the clinic and had a propensity for violence, the Court found the statements to constitute true threats. *Id*. at 926.

The reaction of the listeners in the present case falls somewhere in between the listeners' responses in *Watts* and *Dinwiddie*. While Draskovich's statements were no laughing matter to Allenstein and Anderson, Judge Salter did not react to the statements by wearing a bullet proof vest out of fear for his life. And part of the reason for that may have been because other factors present in *Dinwiddie*—the direct conveyance of repeated threats to the doctor, and the

defendant's history of assault and propensity for violence—were not present here.

The present case is more akin to the facts in *People ex rel. C.C.H.*, 2002 S.D. 113, 651 N.W.2d 702. There, an eighth grade student, C.C.H., told a school teacher on two consecutive days that he wanted "to kill" another classmate. *Id*. at 704. On both occasions, the teacher emailed school administrators to report what had happened. *Id*. The teacher's first email to administrators indicated "a potential explosion is about to happen, and I want some way to deal with the problem ahead of time." *Id*. The day after C.C.H.'s second statement to the teacher, he was arrested, charged and ultimately adjudicated of disorderly conduct. *Id*. at 704-05. At a court trial, the teacher testified the statements "[k]ind of scared me. It was a very serious tone of voice. Very believable." *Id*. at 707. However, on each day the statements were made, both students were allowed to leave at the end of class. *Id*. And although the teacher reported her concerns to school administrators, no explanation was offered as to why administrators did not act more swiftly to the alleged threat. *Id*. On this evidence, the Court found that the State failed to prove C.C.H.'s words constituted true threats. *Id*. The Court noted the "untimely attentiveness by school administrators, lack of compelling testimony by [the teacher] and lack of evidence regarding C.C.H's propensity to carry through with his threats as the basis for finding the statements were constitutionally protected." *Id*.

Similar to *C.C.H.*, Drakovich's words, as well as his angry and loud tone,

alarmed his listeners. Court staff responded by reporting the incident to court security, but Draskovich was not stopped or questioned by security and was allowed to leave the courthouse and go home.[5] *See* CT 40-45. Like *C.C.H.*, the reaction by the authorities to the report of the incident was not swift. *Id*. No attempt was made to locate Draskovich that day, and law enforcement did not make contact with Draskovich over the phone until the following day. *Id*. The lack of immediate response by law enforcement was likely due to the incident being perceived by the authorities as a nuisance rather than a true threat, as Detective Zishka told Draskovich over the phone. See Ex. 1 4:04-4:08.

Although Draskovich's anger, frustration and vitriolic hyperbole alarmed and concerned those who witnessed his behavior on the day in question, the responses from those involved in this case does not warrant the conclusion that Draskovich's statements constituted unprotected speech. "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." As in *C.C.H.*, the first factor does not support a finding of a true threat.

2. Whether the Alleged Threat was Conditional

The second factor requires the Court to examine the actual words conveyed by Draskovich to help the Court determine whether they would be

[5] If Allenstein or another court staff member immediately approached security after Draskovich left the clerk's office and went upstairs to court administration, as she testified, then security would have had the opportunity to stop Draskovich before he left the building. Draskovich would have had to pass security when he came back downstairs to the lobby and exited the courthouse.

interpreted by an objectively reasonable recipient as "a serious expression of an intent to commit an act of unlawful violence" to the object of the alleged threat. *See Black*, 538 U.S. at 359. An explicit and unconditional statement of an intent to commit a violent act against another person is, in general, more likely to be interpreted by a reasonable person as a true threat than a threatening statement conditioned on the happening of some act or event. *See Watts*, 394 U.S. at 708 (finding the conditional nature of the threat to support a finding that the statement was not a true threat). But the "absence of explicitly threatening language does not preclude the finding of a threat. . . ." *U.S. v. Malik*, 16 F.3d 45, 49 (2d Cir. 1994). And "[a] threat may be considered a 'true threat' even if it is premised on a contingency. *U.S. v. Bellrichard*, 994 F.2d 1318, 1322 (8th Cir. 1993). On the other hand, "[e]ven when words are threatening on their face, careful attention must be paid to the context in which those statements are made to determine if the words may be objectively perceived as threatening." *In re S.W.*, 45 A.3d 151, 157 (D.C. 2012).

Here, neither of Draskovich's statements on their face explicitly conveyed an intent to personally undertake a course of action that would result in harm to any person. Draskovich did not tell his listeners that he was going to harm the judge or anyone else. Nor do his statements fit the definition of a conditional threat because Draskovich did not say he was going to harm Judge Salter if he was not granted a work permit. *See* CT 35. Regarding the statement itself, Judge Salter's name was not mentioned, and an ambiguity exists as to whether the

statement was directed at Judge Salter or rather those responsible for making the law that precluded the court from granting an individual a work permit until he fully completes treatment. *See* CT 35. Therefore, a closer examination of the context in which the statements were made is necessary.

The testimony at trial established that Draskovich was angry, vulgar and loud after receiving unfortunate information from clerk staff regarding the return of his bail money and his request for a work permit. CT 21-23, 31-32. In his phone call with Detective Zishka, Draskovich expressed his anger and frustration over several issues related to his prior case, from not receiving his medications at the jail, to the delay of the court's decision of his appeal, to the delay in getting his bail money back at the conclusion of the case, as well as getting sent in several directions at the courthouse without receiving any answers. Ex. 1 at 1:03-2:09; 2:26-2:39; 3:00-3:36. Examples of some of Draskovich's statements to Detective Zishka expressing his frustration include:

> ED: And then yesterday when I was in there, they fucking tell me to go here, then you told me to go there, and then I came back. They said now you gotta go up to fourth floor. Does anybody know what the fuck is going on over there?

Ex. 1 at 2:26-2:39.

> ED: And then I asked for my paperwork. And they says "we don't got it." And then I said "well can I have my fucking bail money then?" Oh no the Judge gotta release it." I said "I asked for it a week ago, he still can't make a decision?" Took him two and a half fucking months to make a decision on a case. What the fuck are you people doing over there?
>
> OZ: I can understand how that can be frustrating.

ED: Oh you can? Yeah, and guess what? Then I found out yesterday the judge won't give me a work fucking permit till I finish. Well, guess what? I'll be called back to work before then.

Ex. 1 at 3:00-3:36.

OZ: I'm just calling you to let you know, I am going to send this over to the State's Attorney's Office for a charge of disorderly conduct.

ED: Oh? I'd like to know how.

OZ: Well, you'll find out, when you're served with the warrant. And then you can look at the evidence against you at your trial. But what I would suggest is that when you go into the courthouse you gotta conduct yourself appropriately. You can't make statements.

ED: No, you know what I gotta fucking say to you? When you deal with me, you need to deal with me like I'm a fucking human being and not fucking just push me around all the fucking time. Every time I goddam go in there none of you mother fuckers know what the hell you're doing.

Ex. 1 at 4:48-5:28.

OZ: Well, you could probably get things done a lot easier if you, you know, you talk to people.

ED: No, I tried that. I fucking tried that. I actually fucking came in there and I was fucking joking around. Then I started getting the goddam push me here, push me there. If I can't raise my goddam fuck—if raising your fucking voice is a fucking crime.

Ex. 1 at 6:02-6:25.

Draskovich's statements to Detective Zishka, along with Allenstein's testimony at trial, demonstrated Draskovich's general frustration with all those involved in his case, including judges, med staff at the jail, and court staff. During her testimony, Allenstein did not indicate that Judge Salter's name was

even brought up in the clerk's office. *See* CT 20-28. Likewise, during Detective Zishka's discussion with Draskovich, Zishka never implied that he was questioning Draskovich about an alleged threat directed at a judge. *See generally* Ex. 1.

When Draskovich went to court administration, the statement in question was heard by Anderson. On cross-examination, the sequence of the discussion and context within which the statement was made was clarified:

> Defense: And Mr. Draskovich came to the 3rd floor seeking some paperwork and you informed him he had to go back downstairs for that paperwork?
>
> Anderson: Correct.
>
> Defense: And you told him that it is not Judge Salter's fault, it is the law, the judge can't deviate from that?
>
> Anderson: Correct.
>
> Defense: And he stated, "Well, that deserves 180 pounds of lead between the eyes?"
>
> Anderson: Yes.
>
> Defense: He never said I'm going to put 180 pounds of lead between Salter's eyes?
>
> Anderson: No.
>
> Defense: Never said anything such as you tell the judge from me that dot dot dot?
>
> Anderson: No.
>
> Defense: Never told you to give Judge Salter any message?
>
> Anderson: No.

CT 35.

Anderson concluded the statement of "180 pounds of lead between the eyes" was directed at Judge Salter "because that's what we were talking about when he made the comment." CT 32. However, it appears equally likely, given Draskovich's expressions of general frustration and disgust toward several persons he came into contact with, that his statements amounted to crude and offensive words directed at the law, or those responsible for enacting it, which prevented him from legally obtaining a work permit. This interpretation would be consistent with the fact that Anderson had just finished telling Draskovich it was not Judge Salter, but the law, that was preventing him from obtaining a work permit. CT 35. Or the statement may have simply been an exaggerated and inappropriate expression of his utter frustration with all of the difficulties he had been experiencing related to his case. This ambiguity as to what or who the statement was directed toward was never satisfactorily removed. *See U.S. v. Barcley*, 452 F.2d 930, 933 (8th Cir. 1971) (stating "[w]here a communication contains language which is equally susceptible of two interpretations, one threatening, and the other nonthreatening, the government carries the burden of presenting evidence serving to remove that ambiguity").

Even if the Court finds Draskovich's statement to be reasonably construed as him saying the judge deserves to be shot for not granting him a restricted driver's permit, this statement is more reasonably interpreted as crude hyperbole

than a serious expression of intent to harm someone. Saying someone deserves to be shot does not imply an intent or determination to carry out violence. Further, telling an individual, for example, that he "deserves to be shot for walking into my front yard again," is far less likely to be interpreted as a threat than telling an individual he "will be shot if he walks into my front yard one more time." Accordingly, under the second factor, and in light of the context in which the statements were made, Draskovich's words support a finding that he did not make a true threat.

3. Whether Person who Made the Alleged Threat Communicated it Directly to the Object of the Threat.

Generally, a statement communicated directly to the object of the alleged threat is more likely to be interpreted as a threat than an oral statement made in a public setting to third persons. *See U.S. v. Bellrichard*, 994 F.2d 1318, 1321 (8th Cir. 1993) (comparing the threatening postcards mailed directly to the objects of the threats in *Bellrichard* to the statement made toward the President at a public rally in *Watts*).

In this case, Draskovich's statements were not communicated directly to Judge Salter, but rather to court staff members at the Minnehaha County Courthouse, which is open to the public. Additionally, Draskovich did not tell Anderson or Allenstein to give any messages to Judge Salter on his behalf. CT 35. Draskovich did not come into contact with Judge Salter that day, and it is unclear whether Judge Salter was at the courthouse when the incident occurred. CT 16-

17. The manner in which Draskovich's statement was communicated more closely resembles the defendant's statements against the President at a public rally in *Watts,* which were held to constitute protected speech, 394 U.S. at 706-08, than the threatening postcards mailed directly to the persons being threatened in *Bellrichard*, which were held to contain true threats. 994 F.2d at 1321-22. Because Draskovich conveyed his statement to a third party, and not the object of the alleged threat, the third factor supports a finding that the statement was not a true threat.

4. Whether the speaker had a history of making threats against the person purportedly threatened.

The fourth factor examines the history of relations between the speaker and the person allegedly threatened. A statement made in the context of an increasingly hostile relationship or longstanding grudge is more likely to be perceived by a reasonable recipient as a genuine threat. *See State v. Krijger*, 313 Conn. 434, 454-55, 97 A.3d 946 (2014); *U.S. v. Whitfield*, 31 F.3d 747, 749 (8th Cir. 1994). An examination of the parties' prior relationship is especially important in a case, like the present, where the statement is ambiguous and susceptible of a more innocuous interpretation. *Krijger,* 313 Conn. at 453-54.

The Connecticut Supreme Court's decision in *State v. Krijger* is illustrative of this point. There, the defendant was involved in a long-standing legal dispute with the town of Waterford due to the defendant's violation of zoning laws related to the accumulation of debris on his property. *Id* at 438. Over a span of

several years, the defendant had been ordered to pay the town many thousands of dollars in judgment liens. *Id*. The attorney for the town in these matters, Kepple, dealt with the defendant on numerous occasions regarding the legal dispute. *Id*. at 439. According to Kepple, the defendant had always been pleasant and cooperative in their interactions during the forty or fifty times Kepple had visited the defendant's property regarding continued violations. *Id*.

After an unusually contentious court hearing between the parties in 2008, however, the defendant followed Kepple out of the courthouse. *Id*. at 439-440. "The defendant then stated to Kepple, '[m]ore of what happened to your son is going to happen to you,' to which Kepple replied, '[w]hat did you say?' . . . [T]he defendant responded, 'I'm going to be there to watch it happen.'" *Id*. at 440. To put the statement in context, Kepple's son had incurred severe brain damage and broken bones as the result of a highly publicized car accident. *Id*. Two days later, the defendant was charged with two counts of threatening in the second degree and breach of the peace. *Id*. at 442. At trial, Kepple testified he was "shocked" and "terrified" by the defendant's statements. *Id*. at 455. The defendant was found guilty of one count of threatening in the second degree and breach of the peace. *Id*. at 442-43.

On appeal, the Court held the defendant's words to Kepple, despite their inflammatory nature, constituted protected speech under the First Amendment. *Id*.at 456. While acknowledging the possibility that Kepple could construe the statements as a threat, the Court found the following scenario more plausible:

> [T]hat the defendant merely was expressing the view that "what goes around, comes around," and that, in the heat of the moment, the defendant felt, albeit irrationally, that Kepple, having reneged on his promise to the defendant, deserved to suffer a fate as terrible as his son's. Under the circumstances, the defendant's second statement, namely, that he would be there when Kepple suffered such a fate, can readily be understood to mean that the defendant looked forward to Kepple's suffering. Although crude and offensive, these sentiments are fully consistent with both the timing of the altercation—that is, right after the court hearing, when the defendant was still very agitated over what had occurred—and the angry, but not physically aggressive, manner in which they were communicated. We agree with the defendant, therefore, that his reference to the car accident involving Kepple's son is most reasonably construed as a low and hurtful blow leveled in frustration, and not as a serious expression of an intent to cause Kepple harm of the nature suffered by his son.

Id.

The Court indicated its conclusion was supported "by the absence of any evidence that the defendant ever had threatened Kepple in the past . . . or that he was the type of person who was capable of carrying out such a threat." *Id*. With regard to their prior relationship, the Court noted there was no history of hostility between Kepple and the defendant, and the two of them had a cordial and long-standing working relationship despite their adversarial positions. *Id*. at 454.

Like *Krijger*, Draskovich had no history of making threats against Judge Salter when the statements in question were made. CT 35. Nor was there any basis to believe Draskovich had a propensity for violence. *See* CT 55. Judge Salter testified at trial that he had presided over Draskovich's appeal of a DUI case and one hearing was held at which Draskovich was present. CT 17. During that

hearing, Draskovich did not make any threats to the judge or otherwise cause any security concerns. CT 17. During the appeal process, Draskovich also sent Judge Salter two letters regarding his case, neither of which contained any threatening language. CT 19; Ex. A, B. No other prior communications between Draskovich and Judge Salter were alleged to have occurred. As such, there existed no evidence in the history of their relations, nor in Draskovich's criminal history, to support the more serious interpretation of his ambiguous statement. As a result, the fourth factor supports the view that Draskovich's statements were not true threats.

5. Whether the recipient had a reason to believe that the speaker had a propensity to engage in violence.

The fifth factor also weighs heavily in favor of a finding that Draskovich's statements amounted to inappropriate and offensive vitriol rather than a serious expression of an intent to harm someone. At trial, no evidence was produced by the State to show Draskovich had any history of violent behavior. *See* CT 55. Accordingly, as in *C.C.H.*, there was nothing in the record to indicate to a reasonable recipient of the statements that Draskovich had a propensity to carry through with acts of violence. 2002 S.D. 113, ¶ 17, 651 N.W.2d at 707.

Applying the five factors to the present case, and considering the totality of the circumstances in which the statements were made, a reasonable recipient would not have interpreted Draskovich's statements as a serious expression of an intent to harm another. Although Draskovich's anger and graphic words

alarmed and concerned his listeners, the lack of immediate response by law enforcement, as well as Detective Zishka's comments to Draskovich over the phone, demonstrated that the incident was perceived more as a nuisance offense than a serious threat to public safety. CT 24-26, 33, 42-45; Ex. 1 4:04-4:08. Draskovich's statement to Anderson was facially ambiguous, and a closer examination of the context of the statement reveals that Draskovich may not have been referring to Judge Salter when the statement was made. *See* CT 35. But even if he was, the statement would be more reasonably perceived as a crude opinion than an expression of an intent to harm. Further, no threatening messages were ever sent directly to Judge Salter, no history of animosity existed between them, and no evidence was submitted to suggest Draskovich had a propensity for violence. CT 17-19, 55.

Similar to *Krijger*, the more plausible interpretation of Draskovich's crude and offensive statements is that they were leveled by him in frustration and anger over the poor manner in which he felt several aspects of his case were being handled. When he arrived to the courthouse, Draskovich was apparently already upset about the jail staff's handling of his medications and the lengthy delay in resolving his case. Ex. 1 at 1:03-2:09, 3:00-3:36. He had been to the courthouse the previous week to inquire about getting his bail money back and obtaining a work permit, and he returned on March 7 to see if anything had been resolved. CT 21, 31-32; Ex. 1 3:00-3:36. That day, Draskovich contended he was being directed by court staff in several different directions but claimed nobody

had any answers for him. Ex. 1 2:26-2:39; CT 23, 30-31. And the answers he did receive were not favorable and made Draskovich increasingly agitated. CT 23. Not only had the order to return his bail money still not been signed, but he also learned that the law precluded him from obtaining a work permit until he finished treatment. CT 35. All of these issues culminated that day in the courthouse and Draskovich expressed his frustration inappropriately with crude and graphic language.

The same analysis applies to Draskovich's disorderly conduct conviction. His statement to Allenstein that, "Now I see why people shoot up courthouses. . . . Not that I would[,]" did not express any intent to commit a violent act, nor was it directed at any particular person. CT 23. Although his behavior at the courthouse may have constituted disorderly conduct under SDCL 22-18-35(1) for intentionally causing "serious public inconvenience by "[m]aking unreasonable noise," Draskovich was charged and convicted under subsection (2)[6] for "[e]ngaging in fighting or in violent or threatening behavior. And because

[6] SDCL 22-18-35 provides:

> Any person who intentionally causes serious public inconvenience, annoyance, or alarm to any other person, or creates a risk thereof by:
>
> (1) Engaging in fighting or in violent or threatening behavior;
> (2) Making unreasonable noise;
> (3) Disturbing any lawful assembly or meeting of persons without lawful authority; or
> (4) Obstructing vehicular or pedestrian traffic;
>
> is guilty of disorderly conduct.

Draskovich was convicted under subsection (2) on the basis of pure speech, his words must be interpreted with the commands of the First Amendment clearly in mind." *Watts*, 394 U.S. at 707.

Draskovich's words were most reasonably construed as an exaggerated and vitriolic expression of his disgust with how he felt his legal matters were being handled by court staff, and not as a serious expression of an intent to harm anyone. This conclusion is buttressed by the lack of evidence to show Draskovich had ever threatened Judge Salter in the past or that he had any propensity for violence. Considering the totality of the evidence and the context in which the statements were made, Draskovich's words constituted protected speech under the First Amendment, and his convictions for threatening a judicial officer and disorderly should be reversed.

CONCLUSION

For the aforementioned reasons, authorities cited, and upon the settled record, Appellant respectfully requests this Court remand this case to the trial court with an order directing the trial court to reverse the Judgment and Sentence and enter a verdicts of acquittal on both counts.

REQUEST FOR ORAL ARGUMENT

The attorney for the Appellant, Edward Draskovich, respectfully requests thirty (30) minutes for oral argument.

Respectfully submitted this 3rd day of April, 2017.

/s/ Beau J. Blouin

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ATTORNEY for APPELLANT

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Book Antiqua typeface in 12 point type. Appellant's Brief contains 8,471 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2007.

Dated this 3rd day of April, 2017.

/s/ Beau J. Blouin

Beau J. Blouin
Attorney for Appellant

APPENDIX

APPENDIX

DEC 19 2016

ICC - 2C - SAD
ICC - Jail

STATE OF SOUTH DAKOTA) : SS COUNTY OF MINNEHAHA)		IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
		SHR 201602997
STATE OF SOUTH DAKOTA, Plaintiff,	+	CR. 49C16001803 A0
vs.	+	JUDGMENT & SENTENCE
EDWARD JAMES DRASKOVICH, Defendant.	+	

An Indictment was returned by the Minnehaha County Grand Jury on May 4, 2016, charging the defendant with the crimes of Count 1 Threatening Judicial Officer on or about March 7, 2016 and Count 2 Disorderly Conduct on or about March 7, 2016. The defendant was arraigned upon the Indictment on May 19, 2016, Christian Ruud appeared as counsel for Defendant; and, at the arraignment the defendant entered his plea of not guilty of the charges in the Indictment. On August 16, 2016, the case was regularly brought on for a Court Trial with Abby Roesler, Deputy State's Attorney appearing for the prosecution and, Christian Ruud, present as counsel with the defendant. The Judge, after having heard the evidence produced on behalf of the State of South Dakota and on behalf of the defendant, found the defendant, EDWARD JAMES DRASKOVICH, guilty as charged as to Count 1 Threatening Judicial Officer (SDCL 22-11-15) and guilty as charged as to Count 2 Disorderly Conduct (SDCL 22-18-35 (1)) with sentencing continued to November 1, 2016.

Thereupon on November 1, 2016, the defendant was present with counsel, Christian Ruud and the State was represented by Deputy State's Attorney, Abby Roesler; at which time the defendant was asked by the Court whether he had any legal cause why Judgment should not be pronounced against him. There being no cause, the Court pronounced the following Judgment and

SENTENCE

AS TO COUNT 1 THREATENING JUDICIAL OFFICER : EDWARD JAMES DRASKOVICH shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for five (5) years with the sentence suspended on the following conditions:

1. That the defendant serve one hundred eighty (180) days in the Minnehaha County Jail, located in Sioux Falls, South Dakota, with ninety (90) days suspended. Report to jail on time November 15, 2016, at 7:00 o'clock P.M.; work release authorized for first 45 days and electronic monitoring for remaining 45 days.
2. That the defendant pay $104.00 court costs and $490.00 in attorney fees to the Minnehaha County Clerk of Courts on the date hereof.
3. That the defendant sign and abide by the standard supervised probation agreement with the Court Services Department for two (2) years.
4. That the defendant obtain a mental health evaluation within thirty (30) days of release from custody and thereafter follow all recommendations of such.

A-1

5. That the defendant complete the Anger Management through The Compass Center immediately upon release from custody.
6. That the defendant the defendant submit to random blood, breath and urine testing as requested by any Court Services or Law Enforcement Officer.
7. That the defendant submit your person, place of residence, vehicle and personal effects to search and seizure at any time of the day or night without the necessity of a search warrant whenever requested to do so by any Court Services or Law Enforcement Officer.
8. That the defendant not possess nor consume alcoholic beverages nor enter establishments where alcohol is the primary item for sale.
9. That the defendant not participate in games of chance or enter establishments where gambling is present.
10. That the defendant not own nor possess any firearms, ammunition, explosive devices or dangerous weapons.
11. That the defendant neither use nor possess any marijuana or controlled drugs or substances or be present where such substances are being used.
12. That the defendant complete any evaluation, counseling, treatment or aftercare as directed by the Court or the Court Services Officer.
13. That the defendant attend all appointments with his Court Services Officer and not lie to or mislead said Officer.
14. That the defendant allow his Court Services Officer to take and control his picture for record-keeping purposes.
15. That the defendant remains within the boundaries of the State of South Dakota unless prior authorization to leave obtained from Court Services Officer.
16. That the defendant obey all local, state and federal laws (including not driving a vehicle without valid license and insurance).
17. That the defendant be subject to the UJS ASR Grid.
18. That the defendant obtain/maintain fulltime employment.
19. That the defendant advise current/future employer(s) of probation and nature of crime and allow job-related discussions between them and Court Services Officer.
20. That the defendant keep his Court Services Officer advised of his current residential address, phone number and employer(s) and notify said Officer of any changes within 48 hours.
21. That the defendant provide his Court Services Officer with access to all social media sites.

AS TO COUNT 2 DISORDERLY CONDUCT: EDWARD JAMES DRASKOVICH shall be incarcerated in the Minnehaha County Jail, located in Sioux Falls, State of South Dakota for thirty (30) days (concurrent to Count 1) with the sentence suspended on conditions #3 through #21 as imposed in Count 1.

It is ordered that the defendant shall provide a DNA sample upon intake into the Minnehaha County Jail, pursuant to SDCL 23 – 5A – 5, provided the defendant has not previously done so at the time of arrest and booking for this matter.

This defendant is eligible for the Minnehaha County Jail "sentenced to serve" program.
yes ___ no X

A-2

Dated at Sioux Falls, Minnehaha County, South Dakota, this 6th day of December, 2016.

BY THE COURT:

JUDGE SUSAN M. SABERS
Circuit Court Judge

ATTEST:
ANGELIA M. GRIES, Clerk
By: _____
Deputy

FILED
DEC 06 2016
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA } ss.
MINNEHAHA COUNTY }
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office.

DEC 14 2016

Clerk of Courts, Minnehaha County

By _____ Deputy

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the Appellant's Brief were electronically served upon:

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Dated this 3rd day of April, 2017.

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28086

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

EDWARD JAMES DRASKOVICH,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE SUSAN M. SABERS
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal filed January 5, 2017

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28086

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

EDWARD JAMES DRASKOVICH,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Plaintiff and Appellant, Edward James Draskovich, will be referred to as "Defendant" or "Draskovich." Plaintiff and Appellee, State of South Dakota, will be referred to as "State." References to documents will be as follows:

Settled record..... SR

Defendant's Brief.....DB

Exhibit 1 (Phone Recording).....Exhibit 1 (Minutes:Seconds)

All documents designated will be followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

On December 6, 2016, Judge Susan Sabers entered a Judgment and Sentence resulting of a court trial in which Defendant Draskovich was found guilty of Count 1: Threatening a Judicial Officer (SDCL 22-11-15) and Count 2: Disorderly Conduct (SDCL 22-18-35(1)). SR 42-44.

Defendant filed his Notice of Appeal in a timely manner on January 5, 2017. SR 45. This Court has jurisdiction of this matter pursuant to SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

WHETHER DEFENDANT'S STATEMENTS CONSTITUTED PROTECTED SPEECH UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

The trial court found Defendant's statements were not protected by the Constitution.

State v. Martin, 2003 S.D. 153, 674 N.W.2d 291

United States v. Bellrichard, 994 F.2d 1318 (8th Cir. 1993)

Virginia v. Black, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003)

People ex rel. C.C.H., 2002 S.D. 113, 651 N.W.2d 702

STATEMENT OF THE CASE AND FACTS

At Defendant's court trial, April Allenstein testified for the state. April is employed in the accounting division of the clerk of courts office for the Second Judicial Circuit in Sioux Falls, SD. SR 113. Her office is located on the first floor of the courthouse. She testified that Defendant had been to the office on several previous occasions attempting to get his bond returned to him in addition to obtaining a work permit. SR 114.

On March 7, 2016, her position was that of an accounting clerk. SR 114. On that same day, Defendant came to her counter and seemed "a little frustrated." SR 116. She knew he had been "angry" about his case. SR 117. The topic about his bond came up as it had in the past.

He wanted his bond returned but April could not release it because it had not yet been signed by the judge. She testified that Defendant left her and went to the criminal division to check on his work permit. He then returned to April's counter, where she was helping someone else. She said he then stepped up to the counter and stated, "Now I see why people shoot up courthouses." SR 116. After that statement, he stepped to the door and while opening it said, "Not that I would." *Id.* She testified that Defendant was "angry." SR 117.

She went on to explain to the court that her reaction was the same at the ten others she worked with, they were "very startled and alarmed." SR 117. She said she felt this way because Draskovich was acting with "anger and frustration and it just seemed like he was capable." *Id.* April went on to elaborate:

> His comment just made me think that, the way that he looked and the words that he spoke, it wasn't just an empty threat. And we often times -- I often times have observed and heard customers say things that are like blowing off steam perhaps or in the heat of the moment. But, just with the history and his behavior the several times he had been in our office, it just seemed to escalate and it was intimidating and scary.

SR 119. As soon at Draskovich left the office, April alerted security.

It was on that same day, March 7, 2016, that Draskovich also went to the court administration office, located at the Minnehaha Courthouse. There he had contact with Brittan Anderson who was working her job of scheduling court hearings. SR 123. Brittan noticed that Draskovich appeared agitated as he approached her. *Id.* She could also see that

Draskovich was getting angry with Judge Salter because his work permit was not ready. SR 124. She pointed out to Draskovich that it was not the judge's fault that he (Defendant) failed to qualify for a permit since he had not completed his required treatment. SR 124. While Brittan then tried to diffuse Defendant's anger at the judge, she realized she was unsuccessful when Defendant stated, "Well, that deserves 180 pounds of lead between the eyes," and then he walked out of the office. SR 125. Brittan was confident that his statement was directed at the judge. *Id.*

She then contacted the court administrator, Karl. SR 125. Brittan told the court that she knew Draskovich was "usually agitated" but had not heard him make threats in the past. SR 126. She said that her reaction to the statement was "Shock, surprise. I've never heard anybody say anything like that before." *Id.* More specifically she said:

> I never -- no one has ever threatened a judge like that before ever. I mean, they have expressed frustration. Some people, you know, some of our regulars, they just need medication. But, I've never heard an actual threat.

SR 127.

On cross-examination, Brittan was asked if Defendant's statement about the Judge [i.e. that he "deserves 180 pounds of lead between the eyes"] gave her a "weird feeling"? SR 129. She responded by stating that it gave her a "shocked feeling." *Id.*

The Honorable Judge Mark Salter also testified at the trial. SR 99. He explained that he is a Circuit Court Judge for the Second Judicial Circuit with his office in Sioux Falls and then went on to discuss his

involvement in Defendant's case. He recalled that Mr. Draskovich's case was assigned to him as an appeal from a DUI conviction. SR 103. He reviewed the matter and saw that the appeal appeared to be somewhat in order, except that he was still waiting for the briefs. *Id.* After more time passed, the judge again looked into the case and realized he still had never received any briefs. *Id.* He then wrote Draskovich and the State. Eventually, the State filed a motion to dismiss the appeal, claiming it never received a notice of appeal. SR 104-05. A hearing on that motion was held and Defendant acknowledged that he never served the states attorney. SR 106. The judge determined that the appeal was not perfected and ordered it dismissed. SR 106-07.

It was after some more time passed that Defendant came to the court administrator's office and made his threatening statements to Brittan Anderson. The judge testified that the he "understood it was a threat to fire a round, a rifle round or some sort of round having a certain grain bullet, between my eyes." SR 108. The judge testified that "I was concerned" when he heard about Defendant's statement. SR 108. He went on to explain, "That doesn't happen often. And, in fact, that's the only time I think it's happened that I am aware of since I have had this job." *Id.* The judge was asked if Defendant's statement impacted his behavior. SR 109. Judge Salter responded by saying "It did." *Id.* He went on to explain that "I was concerned. And I made a conscious effort

to be careful with everything I did and everything around me, in every aspect of my life." *Id.*

Also testifying at trial was Captain Paul Niddringhaus who works in the investigation division within the Minnehaha County Sheriff's Office. SR 130. He was briefed about Defendant's statements on March 7, 2016, from the courthouse deputy's report and assigned Detective Adam Zishka to investigate it further. SR 133-34. Detective Zishka placed a call to Defendant and the call was recorded. At trial, the State had the recording of the phone call admitted into evidence as State's Exhibit 1. SR 134.

On the recording, Defendant denied saying "that deserves 180 pounds of lead between the eyes." He went on to explain that what he actually said was, "There is a good cure for that and its 140 grains of lead." Exhibit 1 (0:39-44). He then said he was "upset about how I am getting screwed over." *Id.* at (0:50–55). He said that, "you guys are a bunch of fucking clowns . . . everybody who works down there." Exhibit 1 (2:17-26). He then angrily referenced the judge by saying:

> It took him two and a half fucking months to make a decision on a case! What the fuck are ya people doing over there?

Id. at (3:14-20).

He said "I'm pissed!" *Id.* at (4:32-36). Then he went on to state that, "Every time I goddamn go in there, none you motherfuckers know

what the hell you're doing!" *Id.* at (5:22–31). As for a statement he previously made to the courthouse staff, he said that he told them:

> And you wonder why people fucking come in to these buildings and fucking go postal and start shooting people . . . because there fucken dealing with this kind of bullshit! That's not fucken threatening anybody…that's stating the fucking facts of the world!

Id. at (6:42-59).

Draskovich continued to get angrier during the interview and said, "That's what I goddamn say, son of a bitch! No, you don't understand! I am so goddamn fucken pissed off about this whole goddamn bullshit!" *Id.* at (7:09-22). Draskovich again directly brought up the judge when he said:

> We're going to talk about every fucken thing you cock-suckers been doing to me. And the only reason I wanted my records from the goddamn Judge because I going to sue you mother-fuckers in civil court!

Id. at (7:58–8:12).

Draskovich then claims he would prove the officer committed perjury and then that the judge furthered the perjury:

> Ya! We're going talk about everything! Were gona talk about how the judge put words in his mouth! We're gona talk about every fucken thing! Ya! I'll tell you what, I am sick of dealing with you cock-suckers!

Id. at (8:23-37).

A complete review of the CD demonstrates that throughout the interview, Draskovich quickly manifests great hostility with his barrage of vulgar and obscene threats. The interview further substantiates the

view that Defendant had a deep-seeded hostility for the clerk of court's office and the judge.

Upon the completion of Captain Niddringhaus' testimony, the State rested as did the defense. SR 138. The trial court then stated that:

> One of the things I heard today was Mr. Draskovich's complaint about the judicial system not being timely. I am very timely. I'm going to issue a decision in this matter yet today. Could you be ready to do that in an hour at 11:00? So if either side wants the answer before noon, take me up on the offer of an 11:00 return. Otherwise, I will reconvene at 1:00.

SR 138-39.

Both the State and the defense made their final arguments. SR 139-53. The judge then made a finding of guilty on Count 1: Threatening a Judicial Officer (SDCL 22-11-15) and Count 2: Disorderly Conduct (SDCL 22-18-35(1)). SR 153-54.

Defendant was sentenced on November 1, 2016. SR 61. During sentencing, the State argued that Defendant has a lack of respect for "any and all sorts of authority." SR 66. This lack of respect was manifested even during his DWI case, when Judge Damgaard held him in contempt. SR 66.

Defendant's trial counsel, Mr. Ruud, made his arguments at sentencing. After that, Defendant made a rather rambling statement. At one point during Defendant's statement, the court cautioned defense counsel and the following coclique took place:

> THE COURT: Mr. Ruud, I am going to interrupt. Frankly, the longer your client testifies – talks here today, I was already convinced he had an anger issue, and I am requiring anger management counseling. I am also requiring a mental health evaluation. I am afraid – I am not bound by the state's lack of penitentiary time. He has significant issues. Do you believe him to be competent here today?
>
> MR. RUUD: I have never had questions regarding his competency.
>
> THE COURT: I am going to give you a minute to talk with him because the more he talks, the more angry he is perceived to be, and the more I think that additional time may be necessary for incarceration. So perhaps you could caution him in that regard.
>
> THE DEFENDANT: No. I hear what she's saying. But I am going to keep talking.
> (A discussion was held between the defense counsel and the defendant.)

SR-81.

> . . .
>
> THE COURT: You can talk here today about reasons for me to send you to the penitentiary or reasons for me to send to the jail or reasons for me to send you otherwise. I am not interested in a life history or your angry vitriol. So you need to confine your comments and tell me if there's anything you would like to say before I impose sentence. SR 82.
>
> THE DEFENDANT: No, no, no, no, no, no.
>
> THE COURT: Where did you intend to put the pounds of lead?
>
> THE DEFENDANT: It's a redneck saying. As to, "Let's get these bums out of there one way or another." This is not –

SR 83.

The Honorable Judge Susan M. Sabers then sentenced Defendant for Count 1: Threatening a Judicial Officer (SDCL 22-11-15) to five years

in the state penitentiary with the entire sentence suspended on various conditions, which included some jail time. SR 42-43. As for Count 2: Disorderly Conduct (SDCL 22-18-35(1)), Judge Sabers sentenced Defendant to thirty days in jail, with the jail time suspended based on certain conditions. SR 43.

ARGUMENT

DEFENDANT'S STATEMENTS DID NOT CONSTITUTE PROTECTED SPEECH UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. *Introduction.*

Defendant claims that his separate statements to both April Allenstein at the clerk of courts office, and Brittan Anderson, in the court administrator's office, where not threats, but are protected speech under the First Amendment. DB. 9. Defendant is incorrect. His statements were "true threats" which are "statement[s] that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another. *Doe v. Pulaski County Special Sch. Dist.,* 306 F.3d 616, 624 (8th Cir. 2002) (en banc)." *United States v. Beale,* 620 F.3d 856, 865 (8th Cir. 2010). True threats do not enjoy First Amendment protection.

B. *Standard of Review.*

Constitutional questions, involving an individual's First Amendment rights, are reviewed by this Court de novo. *City of Pierre v.*

Blackwell, 2001 S.D. 127, ¶ 7, 635 N.W.2d 581, 584 (citing *Steinkruger v. Miller,* 2000 S.D. 83, ¶ 8, 612 N.W.2d 591, 595); *In Re S.J.N-K.,* 2002 S.D. 70, ¶ 6, 647 N.W. 2d 707, 710. Questions of statutory interpretation are also reviewed de novo. *State v. Ducheneaux,* 2007 S.D. 78, ¶ 2, 738 N.W.2d 54-55. Although interrelated, the concepts of vagueness and overbreadth are conceptually distinct doctrines. *State v. Hauge,* 1996 S.D. 48, ¶ 5, 547 N.W.2d 173, 175. Vagueness is usually associated with the right to due process found in the Fifth and Fourteenth Amendments, whereas overbreadth is concerned with First Amendment guarantees of free speech. *Id.*

Defendant also claims that the trial court was incorrect in finding sufficient evidence for his convictions. DB 10. This Court has held that the standard of review for a sufficiency of evidence case is *de novo*. *State v. Plenty Horse,* 2007 S.D. 114, ¶ 5, 741 N.W.2d 763, 764. The question to be answered is whether the record reflects evidence which, if believed by the trier of fact, is sufficient to sustain the finding of guilt beyond a reasonable doubt. *State v. Augustine,* 2000 S.D. 93, ¶ 26, 614 N.W.2d 796, 800; *State v. Larson,* 1998 S.D. 80, ¶ 9, 582 N.W.2d 15, 17. An appellate court will not disturb the trial court's decision absent a clear showing of abuse of discretion. *State v. Perovich,* 2001 S.D. 96, ¶ 11, 632 N.W.2d 12, 15. The test is not whether the appellate court would have ruled the same way, but rather if a "judicial mind, in view of the law and the circumstances, could have reasonably reached the same

conclusion." *Id.* at ¶ 11. The Court does not engage in resolution of conflicts in testimony. The resolution of conflicts, weighing of evidence, or determining the credibility of specific witnesses is not the appellate court's job. *State v. Hage,* 532 N.W.2d 406, 410-11 (S.D. 1995). Inquiry does not require the appellate court to "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." *Plenty Horse,* 2007 S.D. 114, ¶ 5, 741 N.W.2d at 765 (citing *Jackson v. Virginia,* 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979)). This Court has stated:

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Plenty Horse, 2007 S.D. 114, ¶ 5, 741 N.W.2d at 765. The determination is not whether most rational triers of fact would find guilt, but if the evidence is so insufficient that "no rational trier of fact could find guilt beyond a reasonable doubt." *Id.* It should be remembered that Draskovich's asked for a bench trial, so the trier of fact in case was the judge.

C. *Analysis.*

The First Amendment does not prevent enforcement of disorderly conduct statutes or statutes preventing the threatening of judicial officers so long as they are not vague, overbroad or applied to curb protected speech. *Nichols v. Chacon,* 110 F. Supp. 2d 1099, 1104, 1106

(W.D. Ark. 2000) (citing *Houston v. Hill,* 482 U.S. 451, 465-67, 107 S.Ct. 2502, 2511-13, 96 L.Ed.2d 398, 414-16 (1987)); *Beale,* 620 F.3d at 865-66.

The First Amendment does not prevent the government from regulating defamation, "fighting words, incitement, and obscene speech without violating the First Amendment." *State v. Martin,* 2003 S.D. 153, ¶ 18, 674 N.W.2d at 297 (citing *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571-72, 62 S.Ct. 766, 769, 86 L.Ed. 1031, 1034-35 (1942)). Fighting words are those which "inflict injury [or] incite an immediate breach of the peace." *In re S.J.N-K.,* 2002 S.D. 70, ¶ 12, 647 N.W.2d at 711 (citing *Chaplinsky,* 315 U.S. at 571-72, 62 S.Ct. at 769). *But see Greene v. Barber,* 310 F.3d 889, 895-98 (6th Cir. 2002); *Buffkins v. City of Omaha,* 922 F.2d 465, 472-74 (8th Cir. 1990) (fighting words doctrine may be limited in the case of communications addressed to properly trained police officers, who are expected to exercise greater restraint than the average citizen.)

First Amendment protection does not mean absolute protection for all forms of speech. The U.S. Supreme Court has held that government entities may regulate certain types of expression. *See, e.g., Chaplinsky,* 315 U.S. at 571–72, 62 S.Ct. 766. The Eight Circuit summarized *Chaplinsky* by stating that "speech may be regulated if it does not in any sense contribute to the values of persuasion, dialogue, and the free exchange of ideas that the First Amendment was designed to advance."

United States v. Bellrichard, 994 F.2d 1318, 1321 (8th Cir. 1993) (citing *Chaplinsky).*

In *Virginia v. Black,* 538 U.S. 343, 344-45, 123 S.Ct. 1536, 1539-40, 155 L.Ed.2d 535 (2003), the Court held that a state can ban "true threats," *e.g., Watts v. United States,* 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 *(per curiam).* A true threat is when the speaker intends to,

> communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals, *see, e.g., ibid.* The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur. *R.A.V., supra,* at 388, 112 S.Ct. 2538.

Black, 538 U.S. at 344-45, 123 S.Ct. at 1539-40.

The *Black* Court went on to explain that intimidation is a type of "true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id.* The example in *Black* was that a cross burning can be intimidating, "intended to create a pervasive fear in victims that they are a target of violence." *Id.*

Defendant's brief discusses various theories used by courts to determine what a "true threat" is. The Eight Circuit's analysis of a true threat involves an objective test as a "statement that a reasonable recipient would have interpreted as a serious expression of an intent to

harm or cause injury to another. *Pulaski County Special Sch. Dist.,* 306 F.3d at 624." *Beale,* 620 F.3d at 865.

In *People ex rel. C.C.H.,* 2002 S.D. 113, ¶ 14, 651 N.W.2d 702, 707, the South Dakota Supreme Court applied the factor test that the Eighth Circuit set out in *Doe ex rel. Doe v. Pulaski County Special Sch. Dist.,* 263 F.3d 833 (8th Cir. 2001)[1] to determine a "true threat." The factors included:

> Whether an objectively reasonable recipient would view the message as a threat; whether the threat was communicated directly to its victim; whether the maker of the threat had made similar statements to the victim in the past; whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence; and whether the recipient of the alleged threat could reasonably conclude that it expresses "a determination or intent to hurt presently or in the future."
>
> * * *
>
> "Alleged threats should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners." *Id.* (internal citations omitted).

C.C.H., 2002 S.D. 113, ¶ 14, 651 N.W.2d at 707.

The non-exhaustive list of factor to determine a true threat were set out more specifically as in *Pulaski County Special Sch. Dist.,* 306 F.3d at 623. In examining how a reasonable recipient would view the purported threat one must look to:

1) the reaction of those who heard the alleged threat;

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[1] *Doe ex rel. Doe v. Pulaski County Special Sch. Dist.,* 263 F.3d 833 (8th Cir. 2001) was reversed and remanded by *Doe v. Pulaski County Special Sch. Dist.,* 306 F.3d 616, 624 (8th Cir. 2002) (en banc).

2) whether the threat was conditional;

3) whether the person who made the alleged threat communicated it directly to the object of the threat;

4) whether the speaker had a history of making threats against the person purportedly threatened; and

5) whether the recipient had a reason to believe that the speaker had a propensity to engage in violence.

Pulaski County Special Sch. Dist., 306 F.3d at 623.

The states analysis will include a review of these factors in light of the testimony at trial.

1) The reaction of those who heard the alleged threat;

As with all the factors, there are two different events that need to be evaluated: first, the conduct and statements made at the clerk of courts office and second, the conduct and statements made at the court administrators office. A review of the first event involved April Allenstein who is employed at the clerk of courts. April testified that Defendant stepped up to the counter and stated, "Now I see why people shoot up courthouses." SR 116. He then stepped to the door and upon opening it said, "Not that I would." *Id.* She said he was "angry." SR 117.

She went on to testify that her reaction was the same as the ten others she worked with, they "very startled and alarmed." SR 117. She felt this way because Draskovich was acting with "anger and frustration and it just seemed like he was capable." *Id.* April went on to elaborate:

> His comment just made me think that, the way that he looked and the words that he spoke, it wasn't just an empty threat. And we often times – I often times have observed and

> heard customers say things that are like blowing off steam perhaps or in the heat of the moment. But, just with the history and his behavior the several times he had been in our office, it just seemed to escalate and it was intimidating and scary.

SR 119.

As for the second event, it occurred at the court administrator's office. Brittan Anderson testified specifically regarding Defendant's threats and her reaction. SR 123. Brittan observed Draskovich getting angry with Judge Salter because his work permit was not ready. SR 124. She pointed out to Draskovich that it was not the judge's fault, because it was Draskovich that failed to qualify for a permit since he had not completed his required treatment. SR 124. While Brittan then tried to diffuse Defendant's anger at the judge, she realized she was unsuccessful when Defendant stated "Well, that deserves 180 pounds of lead between the eyes" before he walked out of the office. SR 125. She said that her reaction to the statement was "Shock, surprise. I've never heard anybody say anything like that before." *Id.* More specifically she said:

> I never – no one has ever threatened a judge like that before ever. I mean, they have expressed frustration. Some people, you know, some of our regulars, they just need medication. But, I've never heard an actual threat.

SR 127.

On cross-examination, Brittan was asked if Defendant's statement about the Judge [i.e. that he "deserves 180 pounds of lead between the eyes"] gave her a "weird feeling?" SR 129. She responded by stating that it gave her a "shocked feeling." *Id.*

Judge Salter testified as to his view and reaction to the threat. He stated that he, "understood it was a threat to fire a round, a rifle round or some sort of round having a certain grain bullet, between my eyes." SR 108. The judge testified that, "I was concerned" when he heard about Defendant's statement. SR 108. He went on to explain, ". . . in fact, that's the only time I think it's happened that I am aware of since I have had this job." The judge was asked if Defendant's statement impacted his behavior. SR 109. Judge Salter responded by saying "It did." *Id.* He went on to explain that, "I was concerned. And I made a conscious effort to be careful with everything I did and everything around me, in every aspect of my life." *Id.*

It is clear that all parties took the threat very seriously and did not think Defendant was joking or just a little upset. This factor weighs heavily toward a true threat. In *Black,* 538 U.S. at 344-45, 123 S.Ct. at 1539-40, the Court explained that intimidation can be a type of "true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id.* That is exactly what Draskovich did in this case.

2) Whether the threat was conditional;

Another factor is whether the threat was conditional. An example of a conditional statement would be the one in *Watts,* 394 U.S. 705, 89 S.Ct. 1399, where an individual stated: '. . . now I have already received my draft classification as 1-A and I have got to report for my physical

this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.' 'They are not going to make me kill my black brothers.' *Watts,* 394 U.S. at 706, 89 S.Ct. at 1401. The comment was made during political debate and "conditional upon an event-induction into the Armed Forces-which petitioner vowed would never occur, and that both petitioner and the crowd laughed after the statement was made." *Watts,* 394 U.S. at 707, 89 S.Ct. at 1401. The Court found these factors persuasive: "We agree with petitioner that his only offense here was 'a kind of very crude offensive method of stating a political opposition to the President.' Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise." *Watts,* 394 U.S. at 708, 89 S.Ct. at 1402. It is important to note that if the threat is conditional, it still can be found to be a "'true threat' even if it is premised on a contingency. *See United States v. Howell,* 719 F.2d 1258, 1260–61 (5th Cir. 1983) (hospital patient's statement that he would kill the President if released was a true threat), *cert. denied*, 467 U.S. 1228, 104 S.Ct. 2683, 81 L.Ed.2d 878 (1984)." *Bellrichard,* 994 F.2d at 1322.

As Defendant states in his brief, an unconditional statement is more likely to be interpreted by a reasonable person as a true threat. DB 20. There was nothing conditional regarding Draskovich's threat. At the clerk of courts office he states, "*Now* I see why people shoot up courthouses." (emphasis added.) SR 116. Then moments later, while he

was leaving the office, he says, "Not that I would." This snide statement, ("Not that I would") is far from removing, or conditionalizing the threat. It does nothing to reduce the threat as compared to a follow up statement like "You know that I am only kidding, or, I would never do something like that." What Defendant wanted to occur, did actually happen. He wanted his threat to seep the poison of fear into the ears of the clerk of court employees, yet create a pre-textual claim that he never threatened to "shoot up" the courthouse.

As for the statement to the Judge, it was likewise unconditional. Defendant stated that in response to the Judge's conduct, "Well, that deserves 180 pounds of lead between the eyes" before he walked out of the office. SR 125. The Eighth Circuit has said that ". . . it is the making of the threat that is prohibited without regard to the maker's subjective intention to carry out the threat. The threat alone is disruptive of the recipient's sense of personal safety and well-being and is the true gravamen of the offense. *United States v. Manning,* 923 F.2d 83, 86 (8th Cir.), *cert. denied*, 501 U.S. 1234, 111 S.Ct. 2860, 115 L.Ed.2d 1027 (1991)." *Bellrichard,* 994 F.2d at 1324.

3) Whether the person who made the alleged threat communicated it directly to the object of the threat;

It is a misunderstanding to assume that if Draskovich's threat was not made directly to the judge it is not a true threat.

> . . . the speaker must have intentionally or knowingly communicated the statement in question to someone before he or she may be punished or disciplined for it. *Id.* The

> requirement is satisfied if the speaker communicates the statement to the object of the purported threat *or* to a third party. *See, e.g., United States v. Crews,* 781 F.2d 826, 831–32 (10th Cir.1986) (affirming conviction under 18 U.S.C. § 871, where a defendant made a statement to a third party that threatened to kill the President); *Hawaii v. Chung,* 75 Haw. 398, 862 P.2d 1063, 1071–73 (1993) (recognizing that a defendant's statements to other teachers that he would kill the principal were true threats entitled to no First Amendment protection).

Pulaski County Special Sch. Dist., 306 F.3d at 624.

The threat to the clerk of courts officer was directed to the listeners. Then there was the threatening statement in the court administrator's office, "Well, that deserves 180 pounds of lead between the eyes." SR 125. The threat was clearly designed to be conveyed to the judge.

4) *Whether the speaker had a history of making threats against the person purportedly threatened;*

Defendant contends that his threats were merely an "ambiguous statement" and "there existed no evidence in the history of their relations . . . to support the more serious interpretation . . ." DB 29. The State disagrees. April, from the clerk of courts office, said she knew he had been "angry" about his case. SR 116. She went on to testify "But, just with the history and his behavior the several times he had been in our office, it just seemed to escalate and it was intimidating and scary." SR 119. April then said that as soon as Draskovich left the office, she discussed it with her co-workers and alerted security. As for the incident

in the court administrator's office, Brittan testified that she knew Draskovich was "usually agitated." SR 126.

During Defendant's sentencing on November 1, 2016, the State made its argument that Defendant has a "lack of regard or respect for any and all sorts of authority." SR 66. This lack of respect was manifested even during his DWI case, when Judge Damgaard held him in contempt. SR 66. The sentencing judge in this case also reflected on Defendant's anger at the court systems by stating, "Mr. Ruud, I am going to interrupt. Frankly, the longer your client testifies – talks here today, I was already convinced he had an anger issue, and I am requiring anger management counseling." SR 81. These statements reflect a history that shows an escalation of anger by Defendant against the persons he has threatened.

5) *Whether the recipient had a reason to believe that the speaker had a propensity to engage in violence;*

Many of the State's arguments in the previous section support the view that Defendant had a propensity to engage in violence. If there is any doubt, a review of States Exhibit 1 will remove them. The recording on Exhibit 1 involves Detective Zishka placing a call to Defendant. The call took place a day after Defendant's threatening statements at the courthouse. SR 136-37. Even though adequate time to cool down had transpired from the incident, Defendant's high hostility for the judge and the court system is clearly conveyed. Early in the conversation he made reference to the threatening statements. Defendant initially denied

saying "that deserves 180 pounds of lead between the eyes." He went on to clarify that he actually said, "There is a good cure for that and its 140 grains of lead." Exhibit 1 (0:39-44). He then said he was "upset about how he is getting screwed over." *Id.* at (0:50–55). He said that, "you guys are a bunch of fucking clowns . . . everybody who works down there." Exhibit 1 (2:17-26). He then angrily referenced the judge by saying:

> It took him two and a half fucking months to make a decision on a case! What the fuck are ya people doing over there?

Id. at (3:14-20).

He said, "I'm pissed!" *Id.* at (4:32-36). Then he went on to state that, "Every time I goddamn go in there, none you motherfuckers know what the hell you're doing!" *Id.* at (5:22–31). As for the statement he previously made to the clerk of court's staff, he clarified that also:

> And you wonder why people fucking come in to these buildings and fucking go postal and start shooting people…because there fucken dealing with this kind of bullshit! That's not fucken threatening anybody…that's stating the fucking facts of the world!

Id. at (6:42-59).

During the interview, Draskovich continues to get angrier and said, "That's what I goddamn say, son of a bitch! No, you don't understand! I am so goddamn fucken pissed off about this whole goddamn bullshit!" *Id.* at (7:09-22). Draskovich again brought up the judge directly when he said:

> We're going to talk about every fucken thing you cock-suckers been doing to me. And the only reason I wanted my records from the goddamn Judge because I going to sue you mother-fuckers in civil court!

Id. at (7:58–8:12).

Draskovich further claims he will prove that the officer committed perjury and then how the judge assisted in the perjury:

> Ya! We're going talk about everything! Were gona talk about how the judge put words in his mouth! We're gona talk about every fucken thing! Ya! I'll tell you what, I am sick of dealing with you cock-suckers!

Id. at (8:23-37).

D. *Summary*

It must be remembered that the factors above are not an exhaustive list and "whether a statement amounts to an unprotected threat, there is no requirement that the speaker intended to carry out the threat, nor is there any requirement that the speaker was capable of carrying out the purported threat of violence. *Planned Parenthood,* 290 F.3d at 1075." *Pulaski County Special Sch. Dist.,* 306 F.3d at 624.

This Court points out that "[a]lleged threats should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners." *C.C.H.,* 2002 S.D. 113, ¶ 14, 651 N.W.2d at 707 (citing *Pulaski County Special Sch. Dist.,* 263 F.3d 833). In *Austad v. South Dakota Bd. Of Pardons And Paroles,* 2006 S.D. 65, ¶¶ 13-14, 719 N.W.2d 760, 766, this Court sets that concept out with more detail by stating; "The Eighth Circuit Court of Appeals has stated that

"[t]he court must analyze an alleged threat 'in the light of [its] entire factual context' and decide whether the recipient of the alleged threat could reasonably conclude that it expresses 'a determination or intent to injure presently or in the future.'" *United States v. Dinwiddie,* 76 F.3d 913, 925 (8th Cir.1996) (citations omitted); *see also Pulaski,* 306 F.3d at 621-22 (8th Cir. 2002) (en banc) (citations omitted) (reversing *Doe v. Pulaski County Special Sch. Dist.,* 263 F.3d 833 (8th Cir. 2001))." When the analysis above is applied to the entire factual context, it is clear that Defendant made "true threats" that do not fall within First Amendment protection in both Count 1[2] and Count 2.

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[2] *State v. Paulson,* 2015 S.D. 12, 861 N.W.2d 504, *reh'g denied* (Apr. 27, 2015), *cert. denied sub nom. Paulson v. South Dakota,* 136 S.Ct. 555, 193 L.Ed.2d 444 (2015) provides the definition of a threat for statutory analysis of SDCL 22–11–15 but not First Amendment analysis:

> "The criminal statute on threatening a judicial or ministerial officer, SDCL 22–11–15, reads in relevant part:
> Any person who, directly or indirectly, utters or addresses any threat or intimidation to any judicial or ministerial officer ... with intent to induce the person either to do any act not authorized by law, or to omit or delay the performance of any duty imposed upon the person by law, or for having performed any duty imposed upon the person by law, is guilty of a Class 5 felony.
> "Threat" is not defined in criminal statute, so "we rely on its plain and ordinary meaning." *See Brown v. Hanson,* 2007 S.D. 134, ¶ 13, 743 N.W.2d 677, 681. Black's Law defines "threat" most relevantly as "[a] communicated intent to inflict harm or loss on another or on another's property, esp [ecially] one that might diminish a person's freedom to act voluntarily or with lawful consent[.]" *Black's Law Dictionary* 1708 (10th ed. 2014)."

State v. Paulson, 2015 S.D. 12, ¶ 14, 861 N.W.2d 504, 508, *reh'g denied* (Apr. 27, 2015), *cert. denied sub nom. Paulson v. South Dakota,* 136 S.Ct. 555, 193 L.Ed.2d 444 (2015).

CONCLUSION

The State respectfully requests that the trial court's judgment and sentence be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Brief contains 6394 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this 22nd day of May 2017.

_____
John M. Strohman
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 22nd day of May 2017, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Edward James Draskovich* was served via electronic mail upon Beau J. Blouin at bblouin@minnehahacounty.org.

_____
John M. Strohman
Assistant Attorney General

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

NO. 28086

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

vs.

EDWARD JAMES DRASKOVICH,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

HONORABLE SUSAN M. SABERS
Circuit Court Judge

APPELLANT'S BRIEF

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Notice of Appeal Filed on January 5, 2017

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IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

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PRELIMINARY STATEMENT

In an attempt to avoid repetitive arguments, Defendant and Appellant, Edward James Draskovich ("Draskovich"), will limit discussion to the issues that need further development or argument. Any matter raised in Draskovich's initial brief, but not specifically mentioned herein, is not intended to be waived. Draskovich will attempt to avoid revisiting matters adequately addressed in Appellant's brief.

The brief of Plaintiff and Appellee, the State of South Dakota, is referred to as "State's Brief." All citations will be followed by the appropriate page number. Draskovich relies upon the Jurisdictional Statement, Statement of the Case, Statement of Facts, and Statement of Legal Issues presented in his initial brief, filed with the court on April 3, 2017.

ARGUMENT

I. DRASKOVICH'S STATEMENTS WERE INSUFFICIENT TO RISE TO THE LEVEL OF A "TRUE THREAT" AND CONSTITUTED PROTECTED SPEECH UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The State summarizes its argument—that Draskovich's statements constituted "true threats"—by urging the Court to "remember[] that the factors above are not an exhaustive list," and pointing out that "[a]lleged threats should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners." State's Brief 24 (quoting *People ex rel. C.C.H.,* 2002 S.D. 113, ¶ 14, 651 N.W.2 702, 707).

In making this argument, however, the State does not address some key facts that are part of the entire factual context and highly relevant to this Court's analysis. Regarding the first factor, which addresses the reaction of those who heard the alleged threat, the state contends "[i]t is clear that all parties took the threat very seriously . . . ." State's Brief 18. While it is true that court staff recognized Draskovich was extremely frustrated and angry, and they were alarmed by his words, law enforcement's reaction to the event and interaction with Draskovich the next day shows the officers involved treated his words and behavior as disorderly, rather than a serious threat. For instance, Draskovich was not apprehended or arrested by security at the courthouse after making either statement and was allowed to leave and go home. That day, no BOLO was put out to be on the lookout for Draskovich because, as Captain Paul Niedringhaus testified, a BOLO is only put out "when we believe there is public safety, imminent

public safety, or somebody that's possibly armed and carrying a weapon . . . ." CT 43-45. Draskovich was not contacted by law enforcement until the next morning when Detective Zishka placed a call to Draskovich's home. CT 44; *See* Ex. 1. During that phone conversation, Draskovich denied threatening anyone, and Detective Zishka told Draskovich that "*we're not talking about terroristic threats. What we're talking about is disorderly conduct*." Ex. 1 at 4:04-4:08. Thus, law enforcement's reaction to the incident certainly does not support the view that all parties involved perceived Draskovich's words as a serious threat harm another person.

As to factor two, assessing whether the alleged threat was conditional, the State argues "there was nothing conditional regarding Draskovich's threat." State's Brief 19. However, this assertion avoids the fact that the statements do not take on the form of either an unconditional or conditional threat. Draskovich did not say "I'm going to shoot you people at the courthouse," nor did he say, "If you don't give me my work permit I'm going to shoot at the courthouse." Draskovich complained he could understand how other people were driven to violence, in light of the way he felt he was being treated by criminal justice system, as to deride staff with his disgust. This statement did not constitute an unconditional statement of an intent to do harm to others.

As for the second statement, Draskovich did not say "The judge is going to pay for this," or "I'm going to shoot the judge between the eyes," or "If I don't get my work permit, I'm going to put 180 pounds of lead between the judge's eyes." Draskovich responded to court staff's comment regarding his inability to get his work permit by

saying "Well, that deserves 180 pounds of lead between the eyes." The statement amounted to vitriolic hyperbole and an exaggerated expression of how ridiculous Draskovich thought it was that he could not get his work permit while participating in treatment, but had to wait until treatment was completed. Again, the statement did not express or infer an intent to harm the judge. Nor did Draskovich reference the judge when he made the statement. Moreover, the court staff members who testified did not characterize Draskovich's behavior as physically intimidating. *See* CT 20-37. There was no evidence that Draskovich pointed or gestured with his hands or fist toward the workers, or made any other intimidating physical movements to suggest he wanted to do harm to anyone. *See* CT 20-37. The second factor favors a finding of no true threat.

For the third factor, whether the person who made the alleged threat communicated it directly to the object of the threat, the State misconstrues the analysis by focusing on the minimum requirements under the law that must be satisfied in order to potentially constitute a true threat. This minimum requirement "is satisfied if the speaker communicates the statement to the object of the purported threat or to a third party." *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 624 (8th Cir. 2002) (en banc); *see* State's Brief 20-21. In this case, the minimum threshold has been met because Draskovich's statement was communicated to a third party who later relayed the statement to the purported object of the statement. However, the third factor assesses whether the statement was made directly to the object of the alleged threat, or rather to someone other than the object of the alleged threat. A statement communicated directly to the object of the alleged threat is more likely to be interpreted as a threat than an oral

statement made in a public setting to third persons. *See U.S. v. Bellrichard*, 994 F.2d 1318, 1321 (8th Cir. 1993) (comparing the threatening postcards mailed directly to the objects of the threats in Bellrichard to the statement made toward the President at a public rally in *Watts*). Here, Draskovich made the statement to a third party in a public setting which serves as a location where the disputes and grievances between the government and members of the public are settled under the law. A place where emotions often run high. The statement was not communicated directly to the judge, nor was the judge's name referenced in the statement itself. Thus, the third factor favors Draskovich.

Addressing the fourth factor, whether the speaker had a history of making threats against the person purportedly threatened, the State relies on the testimony from April Allenstein, who stated Draskovich had been in the office on previous occasions and was "angry" about his case. State's Brief 21. Allenstein indicated Draskovich "was attempting to get a work permit and waiting on a response from Judge Damgaard regarding the work permit." CT 21. Allenstein testified that Draskovich was "a little frustrated" over his case when he first came in. CT 23. Allenstein acknowledged the "complicated issues" associated Draskovich's case and said "he was often angry about it." CT 23. Likewise, Brittan Anderson in court administration testified that Draskovich was "angry or agitated every time" he came into the courthouse. CT 31-32. Accordingly, the record is sufficient to show Draskovich was frustrated and angry about the handling of his case. And Draskovich made this known in a crude and vulgar manner. However, no evidence in the record exists to show Draskovich ever made threats to court staff during his previous visits to the

courthouse or in his prior communications with the judge. CT 17, 19, 35; Ex. A, B. Accordingly, the fourth factor favors a finding of no true threat.

Finally, the fifth factor, whether the recipient had a reason to believe that the speaker had a propensity to engage in violence, the State focuses on Draskovich's crude and angry statements to Detective Draskovich the day after the incident. Again, the record is clear that Draskovich was extremely frustrated and angry about numerous circumstances related to his case, including the difficulty he experienced with jail staff to get his medications, his inability to get his bail money back or a response from the court on his request for a work permit, as well as his perception that he was being pawned off between court staff. However, nothing in the record demonstrates that Draskovich had a propensity to engage in violence prior to his statements to court staff. Draskovich is a 55 year old resident of South Dakota with no history of violent crime. Thus, the fifth factor also weighs heavily in favor of a finding that Draskovich's statements did not constitute a true threat.

To be sure, Draskovich's statements were inappropriate, crude, and offensive. If the question before this Court was simply whether Draskovich displayed socially acceptable behavior, the answer would be clear. However, that is not the issue. And a finding by this Court that Draskovich's statements did not constitute a true threat would in no way condone this type of behavior. The question is, after applying the objective factor test and considering the entire factual context, whether a reasonable recipient of the alleged threat would have concluded that the speaker was expressing a determination to injure another. *See U.S. v. Mabie*, 663 F.3d 322, 332 (8th Cir. 2011);

Austad v. S.D. Bd. Of Pardons & Paroles, 2006 S.D. 65, ¶ 8, 719 N.W.2d 760, 764. The five factors outlined above are key in answering this question. Further, both the subjective fears and concerns of the court staff members who heard Draskovich, as well as the subjective reactions and statements by law enforcement in response to the event, are not conclusive in deciding the issue.

Applying the objective factor test to the present case, at least four out of the five enumerated factors—factors two through five—favor the conclusion that a reasonable recipient would not have interpreted Draskovich's statements as a serious expression of an intent to harm another. This conclusion is amply supported by the entire factual context, including Draskovich's lack of violent criminal history and the absence of prior threats towards Judge Salter. The more plausible interpretation of the statements is that they were leveled by Draskovich at court staff as an exaggerated and vitriolic expression of his disgust with how he felt his legal matters were being handled by court staff.

CONCLUSION

Considering the totality of the evidence and the context in which the statements were made, Draskovich's words constituted protected speech under the First and Fourteenth Amendments, and his convictions for threatening a judicial officer and disorderly conduct should be reversed.

For the aforementioned reasons, authorities cited, and upon the settled record, Appellant respectfully requests this Court remand this case to the trial court with an order directing the trial court to reverse the Judgment and Sentence and enter verdicts

of acquittal on both counts.

Respectfully submitted this 9th day of June, 2017.

/s/ Beau J. Blouin

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Reply Brief is within the limitation provided for in SDCL 15-26A-66(b) using Book Antiqua typeface in 12 point type. Appellant's Brief contains 7,527 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2007.

Dated this 9th day of June, 2017.

/s/ Beau Blouin
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